ECORD
AND
RIEFS

No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS AND U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE CHAMBER OF OKLAHOMA, TULSA REGIONAL CHAMBER, AND PORTLAND CEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

members to own, operate, and grow their businesses. NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

State Chamber of Oklahoma ("State Chamber") is a non-profit organization created and existing under the laws of Oklahoma. The State Chamber represents more than 1,000 Oklahoma businesses and 350,000 employees. It has been the State's leading advocate for business since 1926. The State Chamber provides a voice for Oklahoma employers and employees in the executive, legislative, and judicial branches of government in Oklahoma.

Tulsa Regional Chamber ("Tulsa Chamber") is a non-profit organization created and existing under the laws of Oklahoma. The Tulsa Chamber serves as the primary advocate for Tulsa's business community, representing more than 3,000 employers and employees across the Tulsa region. The Tulsa Chamber promotes the interests of its members in the executive, legislative, and judicial branches of government in Oklahoma.

In July 2015, *Amici* filed a declaratory-judgment action in the U.S. District Court for the Northern District of Oklahoma, challenging the Waters of the United States Rule ("WOTUS Rule" or "Rule") on statutory and constitutional grounds. *See Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). *Amici* alleged that the WOTUS Rule improperly extends federal regulatory authority to millions of miles

of rivers, streams, and other purely intrastate waters. *Amici* further alleged that many of their members own property that will be subject to costly and burdensome federal regulations under the WOTUS Rule. *Amici* asked the district court to hold the WOTUS Rule unlawful, to vacate and set it aside, and to enjoin its enforcement.

Although *Amici* properly filed suit in the district court, they recognized that the EPA and the Corps ("the Agencies") likely would claim that jurisdiction over their challenge belonged in the courts of appeals. If *Amici* had litigated this issue and lost, they would have forfeited their challenge to the WOTUS Rule because the deadline for filing a petition for review under 33 U.S.C. § 1369 is 120 days from the date of the EPA's action. Therefore, in an abundance of caution, *Amici* filed a protective petition for review of the WOTUS Rule in the U.S. Court of Appeals for the Tenth Circuit. *Amici*'s petition was transferred to the Sixth Circuit, where it was consolidated with similar cases.

After the Sixth Circuit issued the decision below, the district court in Oklahoma—without a motion, briefing, or hearing—issued an order *sua sponte* dismissing *Amici*'s case for lack of jurisdiction. *See State of Oklahoma ex rel. Pruitt v. EPA*, 2016 WL 3189807, at *2 (N.D. Okla. Feb. 24, 2016). Pointing to 33 U.S.C. § 1369(b)(1)(E) and (F) and the Sixth Circuit's decision, the district court summarily concluded that the courts of appeals have original jurisdiction over challenges to the WOTUS Rule. *Amici* appealed that dismissal, arguing that the district court had jurisdiction over the case and that—notwithstanding the judgment of the Sixth Circuit—the district court had an independent obligation to determine

its own jurisdiction. That case is currently pending. *See Chamber of Commerce v. EPA*, No. 16-5038 (10th Cir.).

Thus, after almost two years of litigation, *Amici* still have not had an opportunity to be heard on the merits of their claims. This delay was caused by multiple courts overlooking that courts must "apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

SUMMARY OF THE ARGUMENT

The Sixth Circuit's conclusion that Section 1369(b)(1) grants it jurisdiction over challenges to the WOTUS Rule was erroneous. Section 1369(b)(1) specifies seven categories of agency action for which a challenge must be initiated in the courts of appeals. This is not one of those cases. Subparagraph (E) grants original jurisdiction to the courts of appeals over challenges to an EPA action "in approving or promulgating any effluent limitation or other limitation." But the WOTUS Rule is not a limitation; it instead operates in conjunction with other sections of the CWA to define when its restrictions apply. Similarly, subparagraph (F) provides for original appellate jurisdiction only when the EPA has "issu[ed]" or "den[ied]" a permit to discharge pollutants into a navigable water. But there is no question that the WOTUS Rule itself did not "issue" or "deny" any permits.

Finding original jurisdiction in the courts of appeals would contravene not only the CWA's plain text, but also longstanding canons of statutory construction. Specifically, the Agencies' interpretation of Section

1369(b)(1) fails under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other) and the canon against surplusage. First, by giving the courts of appeals original jurisdiction over seven specific categories of EPA actions, Congress provided that those courts do not have original jurisdiction over other, unspecified EPA actions, such as promulgation of the WOTUS Rule. Second, a statute should be construed to give effect to all of its provisions. But the Agencies' sweeping construction of subparagraphs (E) and (F) would render useless the other provisions of Section 1369(b)(1).

The Agencies advocate a "practical," policy-based reading of the CWA to argue that the Sixth Circuit had jurisdiction over these disputes. Such an approach, however, finds no support in this Court's precedent, much less in the plain text of the CWA. Regardless, public policy and practical concerns favor original jurisdiction in the district courts—not in the courts of appeals. Petitioner's interpretation of the CWA would ensure that litigants are able to challenge EPA actions outside of the 120-day deadline, provide certainty over where they must bring their challenges, and allow for thorough judicial review of the WOTUS Rule. For all these reasons, the decision of the Sixth Circuit should be reversed.

ARGUMENT

I. Challenges to the WOTUS Rule Do Not Fall Within Any of the Clean Water Act's Limited Exceptions Providing for Original Jurisdiction in the Courts of Appeals.

The Court has admonished "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006). "When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). The role of the Court is to "apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

A. Section 1369(b) Makes Plain That the Courts of Appeals Lack Original Jurisdiction Over Challenges to the WOTUS Rule.

The text of subparagraphs (E) and (F) of Section 1369(b)(1) make plain that the courts of appeals lack original jurisdiction over challenges to the WOTUS Rule.

Section 1369(b)(1)(E). Subparagraph (E) grants original jurisdiction to the courts of appeals over an EPA action "in approving or promulgating any effluent

limitation or other limitation." 33 U.S.C. § 1369(b)(1)(E). The CWA defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." *Id.* § 1362(11). The CWA does not define "other limitation."

As the Agencies have conceded, the WOTUS Rule is not an "effluent limitation." *See In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S. ("In re WOTUS Rule")*, 817 F.3d 261, 266 (6th Cir. 2016) (McKeague, J.). It does not "restrict" the "quantities, rates, and concentrations" of pollutants discharged "from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

Instead, the Agencies contend that the WOTUS Rule is an "other limitation under section 1311" because it "*has the effect of* restricting the actions of property owners who discharge pollutants from a point source into covered waters," and "*it has the effect of* imposing limitations or restrictions on regulatory bodies charged with responsibility for issuing permits under the [National Pollutant Discharge Elimination System ("NPDES")] to those who discharge pollutants into covered waters." *In re WOTUS Rule*, 817 F.3d at 266 (McKeague, J.) (emphases added). True enough: the WOTUS rule will have those *effects*. But the Rule *itself* is not an "other limitation" within the meaning of subparagraph (E) for the simple reason that the Rule standing alone does not

limit anything. *See Friends of the Everglades*, 699 F.3d at 1286 (defining "limitation" as a "restriction") (quoting Black's Law Dictionary 1012 (9th ed. 2009)). Instead, the WOTUS Rule "operates in conjunction with other sections scattered throughout the Act to define when its restrictions even apply." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.).

Even if the phrase "other limitation" could be read to encompass a rule that is not itself a limitation, subparagraph (E) still would not encompass the WOTUS Rule because the rule is not an "other limitation *under Section 1311*." 33 U.S.C. § 1369(b)(1)(E) (emphasis added). "[T]he plain text of [subparagraph] (E) clearly delineates what the limitations are, and what they are not: the 'limitations' set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.). The definitional section the WOTUS Rule modifies—*viz.*, "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(12)—does not arise from these sections. "It is a phrase used in the [CWA's] definitional section, § 1362, and no more." *In re WOTUS Rule*, 817 F.3d at 276 (Griffin, J.). Accordingly, "the lack of any reference to § 1362 in [subparagraph] (E) counsels heavily against a finding of [original] jurisdiction" in the court of appeals. *Id.*; *see also Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title' in § 1369(b)(1)(E) if the references to particular sections were not meant to exclude others.").

Indeed, the WOTUS Rule "appl[ies] to all provisions of the [CWA]," including those within the Corps' domain. 80 Fed. Reg. at 37,104. But Section 1369(b)(1) limits jurisdiction only to *EPA* actions, not to actions of both Agencies. The "joint nature of the rulemaking" indicates that this is not an EPA-specific effluent or other limitation. *Loan Syndications & Trading Ass'n*, 818 F.3d at 722.

Section 1369(b)(1)(F). Subparagraph (F) grants original jurisdiction to the courts of appeals over an EPA action "in issuing or denying any permit under section 1342 of this title." Naturally read, subparagraph (F) applies only when the EPA has "issu[ed]" or "den[ied]" a particular permit to discharge pollutants into a navigable water under 33 U.S.C. § 1342. *See, e.g.*, *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1161-62 (9th Cir. 1999) (finding original jurisdiction under subparagraph (F) to review an EPA decision "to issue [NPDES] permits to five municipalities").

The WOTUS Rule did not "issue" or "deny" any permit and is "definitional" only. 80 Fed. Reg. at 37,054. It made no individualized permitting decisions of any kind. *See Friends of the Everglades*, 699 F.3d at 1288 (finding no jurisdiction under subparagraph (F) over "a general rule, as opposed to a decision about the activities of a specific entity"). As such, subparagraph (F) does not grant the courts of appeals original jurisdiction over challenges to the WOTUS Rule.

B. Longstanding Canons of Statutory Construction Confirm That the Courts of Appeals Do Not Have Original Jurisdiction Over Challenges to the WOTUS Rule.

The Agencies' interpretation of Section 1369(b)(1) also fails under two important canons of statutory construction.

Expressio Unius Est Exclusio Alterius. Under this doctrine, "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (7th ed. 1999). "[T]he canon *expressio unius est exclusio alterius* ... has force ... when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "For instance, if the statute in question enumerates the matters over which a court has jurisdiction, no other matters may be included." Sutherland, Stat. Const. § 195 (4th ed.); *see, e.g., Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006). "The more specific the enumeration, the greater the force of the [*expressio unius*] canon." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012).

The Agencies' interpretation of Section 1369(b)(1) disregards the doctrine of *expressio unius* by expanding the CWA's jurisdictional reach to include EPA actions that are not enumerated in Section 1369(b)(1). Congress gave the courts of appeals original jurisdiction over seven categories of EPA actions. 33 U.S.C. § 1369(b)(1)(A)-(G). By doing so, it made clear that those courts do not have original jurisdiction over any other EPA actions taken

under the CWA. *See Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003). Indeed, the courts of appeals "do not lightly hold that [they] have jurisdiction under section 1369(b)(1)" because "the specificity and precision of Section 1369, and the sense of it" demonstrate that the statute is "designed to exclude EPA actions that Congress did not specify." *Nw. Envt'l Advocates*, 537 F.3d at 1015.

Here, Congress specified seven categories of EPA actions that belong in the courts of appeals—none of which can reasonably be construed to cover an administrative rule defining the term "waters of the United States" under the CWA. The courts should respect this legislative choice. *See Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988) ("[T]his court simply is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress—even when it legislates by potpourri—no matter how compelling the policy reasons for doing so.").

The Agencies' "flexible" interpretation of Section 1369(b)(1) would embrace EPA actions not included within the CWA's enumerated categories. "If the exceptionally expansive view advocated by the government is adopted, it would encompass virtually all EPA actions under the [CWA]." *North Dakota v. EPA*, No. 15-59, 2015 WL 5060744, at *1 (D.N.D. Aug. 27, 2015). This is not what Congress intended. If Congress wanted to grant original appellate review of more fundamental decisions, it easily could have done so. *See Longview Fibre Co.*, 980 F.2d at 1313.[2]

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2. Congress knows precisely how to grant the courts of appeals original jurisdiction over all final orders of a particular

Canon Against Surplusage. All else being equal, "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). But under the Agencies' sweeping interpretation of Section 1369(b)(1), the reach of subparagraphs (E) and (F) would be so broad as to make meaningless other provisions of Section 1369.

For example, subparagraph (A) specifically grants courts of appeals original jurisdiction over an EPA action "promulgating any standard of performance under section 1316" for new point sources of pollutants. 33 U.S.C. § 1369(b)(1)(A). But if subparagraph (E) were construed so that "other limitation" means any rule or final agency action "whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities," *In re WOTUS Rule*, 817 F.3d at 270 (McKeague, J.), then subparagraph (E) would subsume subparagraph (A), which would serve no function. Congress would have had no need to include it because a standard of performance under Section 1316 will always limit (directly or indirectly) the discharge of pollutants from new point sources. *See* 33 U.S.C. § 1316(a)(1) (authorizing standards of performance "for the *control* of the discharge of pollutants"); 40 C.F.R. § 401.11(k) (defining standard of performance as a "restriction" on discharges). The Court should not interpret the CWA in a way that produces such a result. *See Am. Paper Inst.*,

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agency. *See, e.g.*, 28 U.S.C. § 2342(1) (all final orders of the FCC are reviewed directly in the courts of appeals); 49 U.S.C. § 46110 (all final orders of the FAA are reviewed directly in the courts of appeals); 15 U.S.C. § 78y(a) (all final orders of the SEC are reviewed directly in the courts of appeals).

Inc. v. EPA, 890 F.2d 869, 876-77 (7th Cir. 1989); *Friends of the Earth*, 333 F.3d at 190-91 & n.14.

Similarly, subparagraph (C) grants courts of appeals original jurisdiction over an EPA action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317." 33 U.S.C. § 1369(b)(1)(C). Section 1342, in turn, authorizes the EPA to "issue a permit for the discharge of any pollutant ... upon condition that such discharge will meet ... all applicable requirements under sections 1311, 1312, 1316, *1317*, 1318, and 1343 of this title." 33 U.S.C. § 1342(a)(1) (emphasis added). If subparagraph (F) is construed so that "issuing or denying any permit" means all "regulations governing the issuance of permits," *In re WOTUS Rule*, 817 F.3d at 271 (McKeague, J.), then subparagraph (C) likewise would be superfluous—Congress would have had no need to enact it because *every* promulgation under Section 1317 will necessarily affect the permitting process. Congress could not have intended this result.

C. There Is No Basis for Invoking Policy or Practical Considerations to Conclude That the Sixth Circuit Had Jurisdiction.

The Agencies argue that the Court should consider "policy" implications and take a "practical" approach to interpreting Section 1369(b)(1). *In re WOTUS Rule*, 817 F.3d at 268 (McKeague, J.). Employing this approach, the Agencies contend, would avoid "a waste of judicial and party resources, delays, and possibly even different results." *Id.* at 277 (Griffin, J.).

But a court is "not at liberty to rewrite the statute because [it] might deem its effects susceptible of improvement." *C.I.R. v. Lundy*, 516 U.S. 235, 252-53 (1996); *see Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) ("Our job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'"); Scalia & Garner, *supra*, at 343-46. Here, "Congress could have declared" all EPA actions—or even this particular definitional determination—reviewable in the courts of appeals; but "[f]or better or worse, it used the narrower word[s]" contained in Section 1369(b)(1). *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 878 (2014). This Court is bound by Congress's decision. In the end, "these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage*, 134 S. Ct. at 892 (citation omitted).

The Agencies rely on *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), to support their assertion that the Court has employed a "practical" approach to reviewing the CWA's jurisdictional provisions. *In re WOTUS Rule*, 817 F.3d at 266-73 (McKeague, J.). Neither case, however, supports this proposition.

In *E.I. du Pont*, the Court determined that the Fourth Circuit had original jurisdiction under subparagraph (E) to review "industrywide regulations limiting discharges by existing [inorganic chemical manufacturing] plants." 430 U.S. at 115. That was because subparagraph (E) "unambiguously authoriz[es] court of appeals review of EPA action promulgating an effluent limitation for existing

point sources under [section 1301]," and the relevant EPA actions were indeed effluent limitations under Section 1301. *Id.* at 136. The Court rejected the argument that subparagraph (E) provided for review only of "[a] grant or denial of an individual variance" under Section 1301 (and not for classes and categories of effluent limitations). *Id.* Beyond conflicting with the text, "petitioners' construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [Section 1342] but would have no power of direct review of the basic regulations governing those individual actions." *Id.*

The Agencies seize on the Court's "perverse situation" wording to argue that the Court requires a "practical" interpretation of subparagraph (E). *In re WOTUS Rule*, 817 F.3d at 267 (McKeague, J.). Just as the Court in *E.I. du Pont* was concerned with bifurcating judicial review, the Agencies contend, the Court should also interpret subparagraph (E) to encompass the WOTUS Rule because it would be "truly perverse" if the courts of appeals had the authority to review numerous individual actions in which EPA issued or denied NPDES permits but not "the basic regulations governing" those permitting decisions (*i.e.*, the WOTUS Rule). *In re WOTUS Rule*, 817 F.3d at 267 (McKeague, J.) (quoting *E.I. du Pont*, 430 U.S. at 136).

But *E.I. du Pont* cannot be stretched this far. The Court's "policy reason came *after* a plain textual rejection of the industry's position." *In re WOTUS Rule*, 817 F.3d at 278 (Griffin, J.). The Court's bifurcation concerns did not drive the jurisdictional analysis in the first instance. "It is, therefore, a far stretch to take this dicta and expand it ... to find jurisdiction proper when a regulation's 'practical

effect' only sets forth 'indirect' limits." *Id.* Moreover, the regulations at issue in *E.I. du Pont* actually involved effluent limitations, whereas "the Agencies here admit they have not promulgated an effluent limitation." *Id.* Thus, the Court's concern that it would be bizarre if a court of appeals could review permit decisions but not the effluent limitations underlying them is not present here. In sum, nothing in *E.I. du Pont* licenses this Court to overlook Section 1369(b)(1)'s text. *Id.*; *see id.* at 283 (Keith, J., dissenting).

Crown Simpson likewise does not authorize the Court to override the text. There, the Court reviewed whether subparagraph (F) gave the courts of appeals original jurisdiction to review an EPA action "denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency." 445 U.S. at 194. The Ninth Circuit had held that it lacked original jurisdiction because the EPA "did no more than *veto* an NPDES permit proposed by the state authority," and therefore, did not actually "issue or deny" a permit. *Id.* at 196. This Court disagreed, holding that when the EPA "objects to effluent limitations contained in a state-issued permit, *the precise effect* of its action is to 'den[y]' a permit within the meaning of [subparagraph (F)]." *Id.* (emphasis added). Otherwise, the Court explained, "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-97. "Absent a far clearer expression of congressional intent," the Court was "unwilling to read the [CWA] as creating such a seemingly irrational bifurcated system" over "functionally similar" actions. *Id.* at 197.

As with *E.I. du Pont*, the Agencies read *Crown Simpson* to require a broad, "practical" interpretation of subparagraph (F). *In re WOTUS Rule*, 817 F.3d at 273 (McKeague, J.). The Agencies contend that *Crown Simpson* grants courts of appeals original jurisdiction not only over EPA actions "issuing or denying a permit," 33 U.S.C. § 1369(b)(1)(F), but also "regulations governing the issuance of permits," *In re WOTUS Rule*, 817 F.3d at 283 (McKeague, J.) (quoting *Nat'l Cotton Council v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009)). Because the WOTUS Rule is a regulation related to permits, the Agencies contend, the courts of appeals have original jurisdiction to review the rule.

But *Crown Simpson*, too, cannot be stretched this far. "The facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense." *Nw. Envt'l Advocates*, 537 F.3d at 1016. Had the EPA not given California the authority to designate NPDES permits, the EPA would have retained the power to grant or deny permits directly. The Court thus concluded "that the fortuitous circumstance that this case arose in a State with permit-granting authority should not produce a different jurisdictional result from a case involving a state without such authority." *Id.* "With this factual overlay, the Court's 'precise effect' exception makes sense." *In re WOTUS Rule*, 817 F.3d at 281 (Griffin, J., concurring). It would have been "perverse" there to read those "functionally similar" situations differently.

But that concern has no application here. "It stretches the plain text of [subparagraph] (F) to its breaking point to hold that a definition setting the [CWA's] boundaries has, under *Crown Simpson*, the 'precise effect' of or is

'functionally similar' to, approving or denying an NPDES permit." *Id.* At most, the WOTUS Rule "informs whether the [CWA] requires a permit in the first place, not whether the Agencies can (or will) issue or deny a permit." *Id.*; *id.* at 283 (Keith, J., dissenting). The mere fact that the WOTUS Rule "relates to" the issuance of Section 402 permits does not amount to an *issuance or denial* of a Section 402 permit. *Friends of the Everglades*, 699 F.3d at 1288. Therefore, nothing in *Crown Simpson* authorizes the Court to disregard the statutory text.

II. To the Extent That Policy and Practical Concerns Are Relevant Considerations, They Support Finding No Original Jurisdiction in the Sixth Circuit.

The Court need go no further than the plain text of Section 1369(b)(1) to reverse. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) ("The starting point for the analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the judicial inquiry is complete."). To the extent that the Court finds policy and practical concerns to be relevant, however, they *support* finding jurisdiction in the district courts. The Petitioner's interpretation of the Section 1369(b)(1) ensures that: (1) litigants are not unduly deprived of their ability to challenge EPA actions outside of the 120-day deadline; (2) litigants have certainty over where they must bring their challenge to an EPA action; and (3) the WOTUS Rule and other EPA actions with nationwide implications receive thorough judicial review.

First, construing Section 1369(b)(1) in accordance with its plain meaning ensures that litigants do not lose their ability to challenge EPA actions outside of the 120-day

deadline. When Section 1369(b)(1) requires initial review in the courts of appeals, the action must be challenged within 120 days of its promulgation. *See* 33 U.S.C. § 1369(b)(2). After this time period has expired, Section 1369(b)(2) bars "judicial review" in *any* future "civil or criminal proceeding for enforcement." *Id.*; *see Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1334 (2013). This "120-day time limit is well-established, and ... strictly enforced." *Nat'l Pork Producers v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011). Thus, if the Agencies are right that Section 1369(b)(1)(E) or (F) applies here, then Section 1369(b)(2) purports to bar a defendant in an enforcement action, even in a criminal prosecution, from raising constitutional or statutory challenges to the WOTUS Rule as applied. This is all the more reason to reject the Sixth Circuit's interpretation.

Because of the draconian nature of Section 1369(b)(2), the Court should be exceptionally wary of extending its reach too broadly and thereby endangering the ability of ordinary individuals and small businesses—particularly as defendants—to challenge the legality of agency action. The APA "creates a 'presumption favoring judicial review of administrative action." *Sackett v. E.P.A.*, 566 U.S. 120, 128 (2012). When a law restricts APA review, therefore, courts construe the limitation narrowly: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

"A special hazard arises when review is available directly to the court of appeals, because availability of direct review forecloses review in certain enforcement

proceedings." *Longview Fibre Co.*, 980 F.2d at 1309. "Reviewability under Section 1369 carries a peculiar sting," which "cuts against [any] argument that a grant of appellate review should be construed liberally." *Id.* at 1313; *see also Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) ("The review-preclusion proviso in [Section 1369(b)(2)] dissuades us from reading [Section 1369(b)(1)] broadly; the more we pull within Section 1369(b)(1), the more arguments will get knocked out by inadvertence later on."). For example, if original review in the court of appeals is required for all rules with some relation to the permitting process, then ordinary landowners—or future landowners, who might be entirely unaware of this rule—might be barred from later challenging any part of it in future actions. The Court should not interpret the statute to deny landowners an opportunity to mount a full defense when an enforcement action is brought.

The WOTUS Rule is a perfect example of this danger. An ordinary homeowner with an intermittent stream in his backyard likely assumes that his *local* land is not subject to a federal law regulating *navigable* waters. But if the decision below stands, then a landowner may be barred from challenging the WOTUS Rule when forced to defend against an enforcement action. Indeed, the CWA's "reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (quoting *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring)). Given these potential harms, Section 1369(b)(1) should not be read to bar judicial review, and certainly not without a clear indication from Congress that the 120-day limitations period has broad applicability. *See Edward J. DeBartolo Corp. v. Florida*

Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Second, Petitioner's interpretation reflects the Court's instructions for simple, straightforward interpretations of jurisdictional rules. The Court has long instructed that "vague boundaries" are "to be avoided in the area of subject-matter jurisdiction wherever possible.'" *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (citation omitted). "[A]dministrative simplicity is a major virtue in a jurisdictional statute" because "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* Indeed, uncertainty as to when and where agency action may be challenged could raise due-process concerns. *Cf. Grayned v. Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). For these reasons, courts should employ "straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.*, 559 U.S. at 94.

Amici's litigation over the WOTUS Rule illustrates these concerns. *Amici* filed their lawsuits (a declaratory-judgment action in the Northern District of Oklahoma and a protective petition for review in the Tenth Circuit) in July 2015. But almost two years later, these and other WOTUS Rule challenges remain stalled due to uncertainty about where jurisdiction properly lies. Instead of following

the plain words of the text, the parties in *Amici*'s cases have been fighting over whether the WOTUS Rule must be challenged in the courts of appeals for "practical," "flexible," and "pragmatic" reasons. This uncertainty has caused the parties—and the taxpayers—to "eat[] up time and money" not over the merits, but over the forum in which the merits should be litigated. *Hydro Resources, Inc.*, 608 F.3d at 1160 n.23; *Longview Fibre Co.*, 980 F.2d at 1314 (lamenting the "tremendous resources in time and money" invested in determining proper forum). Petitioner's plain reading of Section 1369(b)(1) would provide greater certainty in determining the proper forum in which litigants should bring challenges to EPA action.

Finally, Petitioner's interpretation ensures that the WOTUS Rule and other EPA actions with national implications may receive "full consideration by the courts of appeals." *E.I. du Pont*, 430 U.S. at 135 n.26. This Court has long emphasized "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). When multiple courts examine a difficult question, it promotes the "thorough development of legal doctrine by allowing litigation in multiple forums." *Id.* at 163. Indeed, the Court recently stressed the importance of such robust review. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

Reversing the Sixth Circuit's decision and allowing the district courts to exercise jurisdiction over challenges to the WOTUS Rule would ensure that they will be examined by "thorough, scholarly opinions written by some of our finest judges." *E.I. du Pont*, 430 U.S. at 135. Courts considering the validity of the WOTUS Rule may

reach differing conclusions about its validity. Whatever the result, litigation of these cases in different courts would provide an opportunity for rigorous federal review, and thus an "increase[d] probability of a correct disposition," than if review is confined exclusively in the Sixth Circuit. *Atchison, Topeka & Santa Fe R.R. Co. v. Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring).

By seeking to expand Section 1369(b)(1) to centralize review in the Sixth Circuit, the Agencies are attempting to short-circuit the usual judicial percolation process. Although it might be an effective litigation strategy to "squelch the circuit disagreements that can lead to Supreme Court review," *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002), accepting the Agencies' interpretation would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *Mendoza*, 464 U.S. at 160.

Under the Agencies' reasoning, all federal challenges to the same agency actions should be transferred and consolidated into one court of appeals if there is a non-frivolous interpretation for doing so. But this is not what Congress has commanded. Unlike other statutes that place *all* agency actions in the courts of appeals, *see supra* 11 n.2, Congress did so for only seven specific categories of EPA actions under the CWA. That strongly suggests that Congress intended for the traditional, multi-level review to apply in most cases. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 861-62 (1994); *see also In re Clean Water Rule: Definition of "Waters of the United States"*, 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015) (denying transfer and centralization of all district court challenges to the

WOTUS Rule). "It is Congress's job, not [the Court's], to determine the court in which judicial review of agency decisions may occur." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1337 (D.C. Cir. 2013).

CONCLUSION

For these reasons, the Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

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